

counsel, Mr. Stanley acknowledged that he would not necessarily have filled out an accident report if someone reported a minor incident. He also acknowledged that he thought this was a minor injury. Mr. Stanley nevertheless states that he thought that if someone had told him they had hurt their shoulder, that it had popped, that he would have filled out an accident report and would have sent the individual for treatment.

If the question turned solely on the testimony by the claimant and Mr. Stanley, the Board would agree with the decision by the ALJ. But in this case there are several other factors, including contemporaneous medical records, which suggest that claimant did not give notice of a work-related accident in December 1997. First, claimant went to his family doctor rather than requesting medical treatment. Claimant had a prior workers compensation claim for which he was provided medical treatment by this employer. Claimant explains this, in part, by stating that he did not want to have problems such as those he had from the prior workers compensation claim. But claimant not only went to his family physician, he apparently reported there that he had had problems with his shoulder for one year. This history would not necessarily be inconsistent with an aggravating accident in December 1997, but claimant denies having problems for one year. Although difficult to read, it appears from the records that the problems had been worse for six months. In any event, the records are not consistent with claimant's contention that he gave notice of a work-related accident. In addition, claimant underwent an annual review in mid-April 1998. The review included a statement that he had not had any accidents in 1997. Claimant and Mr. Stanley both signed the review document. These factors, together with the testimony of Mr. Stanley, convince the Appeals Board that more probably than not claimant did not give notice in December 1997 of his alleged accident of December 5, 1997.

The first notice claimant gave would have been in April 1998, more than 75 days after the date of accident. The claim is, therefore, barred per provisions by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered on October 1, 1998, by Administrative Law Judge Brad E. Avery should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: David O. Alegria, Topeka, KS
John F. Carpinelli, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director